Supreme Court, U.S.
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No. 97-1012

In The

Supreme Court of the United States

October Term, 1997

ROBERT J. COUPÉ,

Petitioner,

vs.

FEDERAL EXPRESS CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Should Petitioner, who waived his right to challenge the FAA's Age-60 Rule by failing to pursue an exemption petition, be permitted to put the public safety at risk by challenging the Rule in a proceeding in which the FAA is not a party?

CORPORATE DISCLOSURE STATEMENT

Parties:

Robert J. Coupe

Federal Express Corporation

Parent Company:

FDX Corporation

Nonwholly-owned subsidiaries:

Flying Tigers Limited

The Flying Tiger Line (NZ) Limited

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PRELIMINARY STATEMENT

Petitioner challenges the airline industry's "Age-60 Rule," which the FAA, finding no practical individual screening method, has determined continues to be the best means to protect the safety of air transport operations like those of Federal Express. Federal Express is required by federal law to apply the Rule to the Petitioner, subject to the right of each individual to seek FAA exemption. Petitioner waived his statutory right to appeal the FAA's denial of his exemption petition, instead choosing to sue Federal Express and not the FAA. But it is the FAA, not Respondent, that has the interest in defending this Rule as well as the expertise and knowledge behind it. Petitioner's litigation tactic puts the public at risk and should fail.

Respondent requests the Court to deny the petition for writ of certiorari seeking review of an opinion of the Court of Appeals for the Sixth Circuit, reported at 121 F.3d 1022 (6th Cir. 1997) (the "Opinion") that affirmed the unreported opinion of the United States District Court for the Western District of Tennessee, Western Division which rendered its Order Granting Defendant's Motion To Dismiss Complaint, Case No. 95-2851-D/V on June 5, 1996 (the "Dismissal Order"). For the Court's convenience, all citations to the Sixth Circuit's opinion will be to the opinion attached as Appendix A to the Petitioner's Petition for Writ of Certiorari ("Petition").

STATEMENT OF THE CASE

Petitioner asserts that Federal Express Corporation ("Federal Express") violated his rights under the ADEA when it applied the FAA's Age-60 Rule to him, as it was required to do as a carrier operating aircraft used to carry cargo for hire (hereafter, a "Part 121 air carrier"). Petitioner asserts: (1) the Age

Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA") entitles him to an individual factual inquiry into the question whether the Age-60 Rule, 14 C.F.R. § 121.383(c), operates as a bona fide occupational qualification ("BFOQ") 29 U.S.C. § 623(f); and (2) the particular factual inquiry is proper in this case between Petitioner and Federal Express only, despite the absence of the Federal Aviation Administration ("FAA"), which promulgated the Rule under its statutory authority.

The District Court held that since Federal Express was directly bound to adhere to the Age-60 Rule, its implementation of the rule is a BFOQ which is, in the ADEA's words, "reasonably necessary" to the operation of Federal Express' particular business. The District Court stated that the present action does not provide the proper forum for Petitioner's attempt to overturn the FAA's rule.

The Sixth Circuit held that in maintaining the Age-60 Rule, the FAA "performed the same sort of analysis that a court would undertake in determining the legitimacy of a BFOQ defense under the framework established by the EEOC regulation [29 C.F.R. § 1625.6(b)]." This is so because (1) the FAA determined that the rule's promulgation continues to reflect the concern about aging pilots that makes the rule "reasonably necessary" to flying aircraft engaged in Part 121 operations; (2) the rule is premised upon the impossibility or impracticality of individually determining whether a particular pilot's age renders him unable to perform safely and effectively; and (3) the FAA has considered alternatives with less discriminatory impact and rejected all of them as less safe than the Age-60 Rule. The Sixth Circuit stated:

> The employer's burden to make a particularized factual showing in support of its BFOQ defense is

> satisfied by demonstrating the existence of an age-based federal agency rule by which the employer is bound — at least where, as here, the rule has been adopted on grounds that could support a BFOQ defense had the age limit been adopted by the employer voluntarily.

Opinion, a-8.

Finally, the Sixth Circuit noted that Mr. Coupé waived his statutory opportunity to gain judicial review of the FAA's denial of the exemption from the Age-60 Rule he himself had earlier sought. *Id.*, a-9-10.

REASONS FOR DENYING THE WRIT

I.

THE FAA'S DECISION, AFTER CAREFUL REVIEW, TO KEEP THE AGE-60 RULE IN EFFECT SHOULD NOT BE SECOND-GUESSED IN THIS PROCEEDING.

A. This Is Not The Proper Proceeding To Contest The FAA's Determination.

After extensive continuing review, the FAA has decided to maintain the Age-60 Rule for Part 121 pilots like the Petitioner. The Rule is promulgated under the FAA's express, congressionally-mandated authority to prescribe "regulations in the interest of safety for the maximum hours or period of service of airmen." 49 U.S.C. § 44701(a)(4). As the FAA found in its December 1995 decision,[1] the Rule is necessary because

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1. This FAA ruling, or "disposition," is hereafter referred to as the "December 1995 Disposition."

of the "progressive anatomic, physiological, and cognitive decline associated with aging" (60 Fed. Reg. 65,981 (1995)), which necessarily threatens the safety of air commerce, and because, in the current state of medical knowledge, the Age-60 Rule is still the best antidote to potential air carrier disasters. The FAA noted that a general rule is still necessary because there is no adequate method or protocol to enable it to screen out those individual pilots over age 60 who should be required to stop serving in public transport. 60 Fed. Reg. 65,985.

Petitioner here questions the validity of this Rule. But instead of suing the FAA, which decided upon and imposed it, Petitioner chose instead to bring an ADEA action against Federal Express, which did not gather the relevant evidence underlying the Rule and which is required to follow the FAA's mandate or face revocation of its license.[2] By its tactical choice, Petitioner ensured that the only knowledgeable party, the FAA was not, and is not, a party to this action.

Petitioner had an appropriate procedure for challenging the Age-60 Rule with the FAA, the rule's originator, but declined to pursue it. *See* Petition, p. 15, n.7. In 1994 he filed a petition with the FAA for an exemption from the Age-60 Rule. The

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2. 49 U.S.C. § 44701(b)(1) empowers the Administrator of the FAA to prescribe minimum safety standards for air carriers holding certificates under § 44705. Section 44701 is among the provisions 14 C.F.R. § 121.383(c) cites as its authority for requiring Part 121 carriers to adhere to its safety mandate. 49 U.S.C § 46301(a)(2)(B) and (a)(4) provide for a monetary penalty for violations of regulations promulgated under the FAA's mandate to prescribe minimum safety standards for air carriers issued operating certificates (*see* 49 U.S.C. §§ 44701(b)(1) and 44705. 49 U.S.C. § 44709(b)(1)(A) provides for the revocation of any part of a carrier's certificate if the Administrator finds that "safety in air commerce or air transportation and the public interest require the action."

FAA denied this petition on January 24, 1996, and Petitioner declined to appeal the denial to a court. *See* Opinion, a-9-10.[3] Before this time, the FAA had invited exemption-petitioners to submit "a proposed technique, not discussed in the [December, 1995] Disposition, to assess an individual pilot's abilities and risks of subtle and sudden incapacitation." 60 Fed. Reg. 65,980; Petition, p. 15. n.7. There is no indication that Petitioner, whose 60th birthday was December 29, 1995, ever submitted anything that suggested a method to evaluate him or anyone else on an individual basis. Thus, Petitioner failed to submit anything to undermine the FAA's conclusion that the Age-60 Rule enhances the safety of air transport. The FAA's conclusion was affirmed in *Professional Pilots Fed'n. v. FAA*, 118 F.3d 758 (D.C. Cir. 1997).

By pursuing a proceeding in which the FAA is not a party, Petitioner ensured that no party to this proceeding is fully equipped to defend the Rule. As the Sixth Circuit noted, Federal Express "has no strong incentive to defend the rule; as its arguments to us attest, its interest lies in avoiding an injunction that compels it to violate a federal regulation." Opinion, a-4. The lower courts' rejection of Petitioner's tactics needs no review in this Court.[4]

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3. *See* 49 U.S.C. § 46110(a).

4. Petitioner's complaint that the exemption procedure's "compelling evidence" burden is heavier than the employer's burden under the ADEA (Petition, p. 15, n. 7) cannot survive *Professional Pilots*' holding that "the ADEA does not limit the authority of the FAA to prescribe mandatory retirement for pilots." 118 F.3d at 763. For the ADEA's power surely cannot trump the FAA's means for providing relief from the Rule when the Rule itself is beyond the ADEA's reach.

B. The Age-60 Rule Is A Bona Fide Occupational Qualification.

Not only is this proceeding not the proper way to challenge the FAA's rule, but also the Sixth Circuit is plainly correct in its conclusion that, as to pilots under the Age-60 Rule's mandate, the Rule is a BFOQ as a matter of law because "the FAA performed the same sort of analysis that a court would undertake in determining the legitimacy of a BFOQ defense under the framework established by the EEOC regulation." Opinion, a-5. That is, no satisfactory method exists to screen out pilots over 60 on an individual basis. So the Age-60 Rule is, in the current state of knowledge, the best-known alternative to protect the safety of air commerce.

II.

PETITIONER'S LEGAL CHALLENGES TO THE AGE-60 RULE'S APPLICATION TO HIM ARE MISTAKEN.

A. There Is No Conflict Among The Circuits Concerning The Mandatory Application Of The Age-60 Rule.

The fact that courts sometimes observe that medical science may one day render a present a BFOQ invalid hardly creates a conflict *see* Petition, pp. 16-17, and cases dealing with personnel not engaged in Part 121 operations are irrelevant. *See* Petition, p. 17; Opinion, a-5-7. The mandate of the Age-60 Rule, 14 C.F.R. § 121.383(c) is explicitly directed to "the services of any person as a pilot on an airplane engaged in operations under *this part* if that person has reached his 60th birthday." Petitioner was a Part 121 pilot, and the Sixth Circuit's holding was based upon his status as such.

Finally, Petitioner's assertion that he is "whipsawed" by the "sharply different reasoning" of this case and *Professional Pilots Fed'n. v. FAA*, 118 F.3d 758 (D.C. Cir. 1997) (Petition, pp. 18-19) is spurious. The fact is, Petitioner "whipsawed" himself by sacrificing his right to the judicial appeal that could have encompassed all his individual challenges to the Rule. Instead, he brought an overreaching claim against a Part 121 carrier whose disobedience of the Age-60 Rule could have subjected it to sanctions or the revocation of its license. Petitioner himself notes that the outcomes of *Professional Pilots* and the Sixth Circuit's opinion below are consistent. Petition, p. 19. If the *Professional Pilots* decision that "the ADEA does not limit the authority of the FAA to prescribe a mandatory retirement age for pilots" leaves any room for the analysis of individual pilot's complaints like that in the appeal below,[5] the procedure would continue to be the judicial review under 49 U.S.C. § 46110(a) that Petitioner waived in this case.

B. There Is No Statutory Conflict In This Case Requiring The Court's Attention.

Petitioner's assertion of a "confused state of the law" is mistaken. Cases about the harmonization of conflicting statutes[6]

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5. Even Judge Wald prefaced her strong disagreement with the FAA's justification of the Rule's retention by saying: "I agree that the ADEA does not directly govern the FAA in its role as a regulator, and thus the FAA need not prove that the Age 60 Rule is a bona-fide occupational qualification for pilots." 118 F.3d at 770. And the individual pilot's appeal of the denial of his petition for exemption from the Age-60 Rule (Case No. 96-1026) was subsumed into the court's rulings that (1) the ADEA did not limit the FAA's authority regarding pilots' mandatory retirement; and (2) that the 1995 Disposition had sufficient support in the FAA's deliberations.

6. *Watt v. Alaska*, 451 U.S. 259 (1981) and *Patterson v. McLean Credit Union*, 491 U.S. 164 (1988)(Petition, p. 21).

are inapplicable since there is no conflict here. Even if *Professional Pilots* left some questions about the relationship of the ADEA and the FAA's Age-60 Rule's application to Part 121 pilots, this would not be the case that could resolve them, as noted above. Furthermore, in none of Petitioner's cases was the party held accountable to the particular federal statute thereby put in jeopardy of sanctions for violating another federal mandate. (*See* Petition, pp. 21-22.) Finally, Petitioner's criticisms of the Age-60 Rule were considered by *Professional Pilots* and the Sixth Circuit below, both with the aid of briefing by Petitioner's present counsel, Messrs. Cobbs and Pangia.

CONCLUSION

The Sixth Circuit properly ruled against Petitioner's attempt to put Federal Express at risk of violating either the ADEA or the mandatory retirement rule of the agency charged with promulgating and enforcing air safety rules. The writ of certiorari should be denied.

Respectfully submitted,

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